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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. [redacted]6. 4

SEABOARD AIR LINE RAILWAY COMPANY,
APPELLANT,

VS.

A. W. WATSON, APPELLEE.

BRIEF ON BEHALF OF APPELLANT.

W. J. Oven,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 706.

SEABOARD AIR LINE RAILWAY COMPANY, APPELLANT,

VS.

A. W. WATSON, APPELLEE.

OFFICIAL RECORD BELOW.

The opinion delivered by the Supreme Court of Florida (the Court below) appears reported in

Seaboard Air Line Ry. Co. v. *Watson,* (Florida Report and paging not yet announced) 137 So. 719. See also Tr. pp. 54-61, Petition for Rehearing, Tr. p. 66, Denied, Tr. 66.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 237, Judicial Code (USCA Title 28, Section 344) as amended by the Act of February 13th, A. D. 1925, Chapter 229, 43 Stat. 937, in that the judgment below was a final judgment in a suit in the highest court of the

State of Florida in which a decision in the suit could be had, and there was drawn in question the validity of a Statute of the State of Florida, to-wit, Section 7051, Compiled General Laws of Florida, 1927, (Section 4964, Revised General Statutes of Florida, 1920, Section 3148, General Statutes of Florida, 1906—Section 17, Chapter 4071, Laws of Florida, Acts, 1891) which reads:

> "A railroad company shall be liable for any damage done to persons, stock or other property, by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employ and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

This Statute was taken from and is a duplicate of the Georgia Statute construed and condemned by this Court in

> *Western & Atlantic R. R. Co.* v. *Henderson,* 279 U. S. 639, 73 L. ed. 884, 49 Sup. Ct. Rep. 445.

The construction of the Georgia Statute by the Georgia Courts has been adopted and approved by the Supreme Court of Florida.

> *Atlantic Coast Line R. R. Co.* v. *Beasley,* 54 Fla. 311; 45 So. 761.

The contention was and is made that:

(a) The Statute is unconstitutional and void because it denies to appellant the equal protection of the

laws guaranteed to it by the Fourteenth Amendment to the Federal Constitution for the very reasons and under similar facts pointed out by this Court in the case of

Western & Atlantic R. R. Co. v. *Henderson, supra,*

as the appellant was, under the construction placed upon it, required to prove by a preponderance of the evidence to the satisfaction of the jury that it was *not negligent* as against the allegation of the appellee's complaint that it *was negligent,* in spite of the fact that appellant by its evidence overcame any reasonable *prima facie* rule of evidence raised by proof *only* of injury and damage.

(b) The Statute was and is now (if not, when passed), unjustly discriminatory and therefore in conflict with the Fourteenth Amendment and void, in that appellant (and others likewise situated) was required thereunder to prove, where any damage was done to persons, stock or property by the running of the locomotives, or cars, etc., that its agents had exercised all reasonable care and diligence, the presumption in all cases being against it; whereas, persons, firms or corporations operating motor vehicles for the transportation of passengers and freight for hire on the highways in competition with appellant (and others likewise situated) enjoyed the privilege of the ordinary rule of law that he who alleges negligence must prove it.

Exempli Gratia.

(1)

A travels by bus or train. A collision occurs at a grade crossing between the two passenger vehicles of respective classes. He sues both as joint tort feasors. Under this Statute the defendant railroad company has to prove that it was not negligent and that its agents and servants used all ordinary and reasonable care and diligence, the presumption being against it, while the defendant bus company in the same case can require A to prove that the bus company was negligent and that its agents and servants failed to use the proper degree of care and diligence.

(2)

Appellant's freight train leaves a given terminal for a given destination and a motor truck carrier leaves from the same place for the same destination. Appellant's train travels on appellant's roadbed, the motor freight carrier travels on the public highway. The railroad and the highway run parallel and close to each other. A team from the backwoods attempts to cross both at a country road, crossing the two at right angles. If the team is demolished by the motor vehicle carrier for hire the owner of the team must prove the negligence of such carrier. If demolished by the freight train the railroad company must "make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

(3)

If the railroad is that of a lumber company, on which engines and cars hauling logs as an incident to the business of the lumber company, engaged solely in the transportation of such logs, not operating as a common carrier for hire, in case of injury or damage caused by such logging road, regardless of the size, weight, equipment and load of the engines and cars, the burden is upon the one who alleges negligence to prove it; contra, if the railroad is operating as a common carrier, in case of injury or damage sustained by the operation of its engines, trains or cars, regardless of how well equipped and manned, or how light and suitable they may be, the burden is upon that company to show that its agents exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company.

To illustrate the fundamental inequality of the Statute and the State Court's construction thereof as against the principles of equality guaranteed and preserved by the Fourteenth Amendment to the Constitution of the United States, the Court is respectfully requested to compare the holding of the State Supreme Court in the instant case and its decisions therein cited with that of

Fla. Motor Lines v. *Ward*, 102 Fla. ...., ...,
137 So. 163, 166,

wherein the Supreme Court of Florida said:

"To hold that he was guilty of contributory negligence would necessarily imply some negligence

on the part of defendant which does not appear, neither is this a case in which the presumptive evidence rule as prescribed in Section 4964, Revised General Statutes of 1920, (Section 7051, Compiled General Laws of 1927), or the comparative negligence rule as prescribed by Section 4965, Revised General Statutes of 1920, (Section 7052, Compiled General Laws of 1927), may be invoked."

And the case of

Luster v. *Geneva Mill Company,* 102 Fla. ...., ..., 135 So. 854, 855,

wherein the same Court said:

"We have also held that a corporation or company engaged in the operation of a sawmill and operating as an incident to such business an ordinary log road or tram road for the purpose of transporting logs from the forest to the mills, is not a 'railroad company' within the provisions of 4964, 4965 and 4966, Revised General Statutes 1920, Sections 7051, 7052 and 7053, Compiled General Laws of Florida 1927. Here, however, the train was not used solely for transporting logs to the mill of the defendant appellee. While the defendant was engaged in the lumber business, there was undisputed evidence before the Court that it also hauled freight for hire. * * *."

And the case of

J. Ray Arnold Lbr. Co. v. *Carter,* 91 Fla. 548, 559, 108 So. 815, 819,

wherein the Court said:

"A corporation or company engaged in the operation of a sawmill, and operating as an incident to such business an ordinary log road or tram road for the sole purpose of transporting logs from the forest to the mills, is not a 'railroad

> company' within the provision of Sections 4964, 4965 and 4966, Rev. Gen. Stat. 1920. In an action to recover for injuries caused by the running of trains over such a log road or tram road, the presumption of negligence prescribed by Section 4964 *supra*, does not apply, but recovery must be had under the rule that the burden of proving negligence is upon him who alleges it."

And also, in the case of

> *Grace* v. *Geneva Lumber Co.*, 71 Fla. 31, 34, 70 So. 774.

wherein the Court said:

> "If the defendant company was, in fact, doing the business of a railroad company, the Statute would apply, even though the name of the company and its primary business indicated that of a lumber or milling company."

(c) That the refusal by the trial court and the affirmation of such ruling by the State Appellate Court of a requested charge to the jury (the above Statute notwithstanding) setting forth the rights and duties of the traveller on the highway and the railroad company operating its trains on its own track, as defined by this Court in the case of

> *Baltimore & Ohio R. R. Co.* v. *Goodman*, 275 U. S. 66, 72 L. ed. 167, 48 S. C. R. 24,

deprived the appellant of the due process of law and of the equal protection of the laws guaranteed to it by the Fourteenth Amendment.

(d) That the construction by the Supreme Court of Florida upon the Statute when this case was before it on writ of error and on petition for rehearing,

resulted, by the effort of that Court to explain or reason out of the Florida Statute the vice pointed out by this Court in the Georgia Statute (identical in language) and overruling the assignments of error taken as against said charges, and thereby sustaining them, in depriving this appellant of the due process of law and the equal protection of the laws guaranteed to it by the Fourteenth Amendment to the Federal Constitution as pointed out by this Court in the case of

Western & Atlantic RR. Co. v. *Henderson, supra,*

and as subsequently followed by the Supreme Court of Mississippi in the case of

N. O. & G. N. R. Co. v. *Walden,* 160 Miss. 102, 133 So. 241,

and as followed by the Supreme Court of the State of Georgia, after the Statutes of that State, in obedience to the mandate of the Henderson case, had been redrafted and reenacted to conform to the Mississippi Statute, and thereafter construed in

S. A. L. Ry. Co. v. *Fountain,* 173 Ga. 593, 160 S. E. 789,

in this:

While the case stood under the pronouncement of this Court on an equal basis as between the litigants at the close of the evidence, with the scales of justice balanced, and the lawful burden then resting upon the plaintiff in the trial court to establish to the satisfaction of the jury by a preponderance of the evidence that this appellant as defendant below was negligent, yet the trial court in each of the several charges

complained of in the Specification of Errors assigned, to-wit, Nos. 5, 6, 7, 8, 9, 10, 11 and 12, and each of them severally, gave the jury to understand that the burden of proof, after they retired to their room, rested still upon the shoulders of this appellant here to convince them by a preponderance of the evidence that its agents and servants had exercised all ordinary and reasonable care and diligence in the premises. In short, while under the rule laid down by this Court in the Henderson case, *supra,* and the Turnipseed case (from Mississippi) distinguished therein, the case should have gone to the jury on the evidence, with the scales of justice equally balanced, to be weighed accordingly by the jury, yet the Court by these charges, severally, and collectively, bore down upon the plaintiff's side of that scale in the trial court and told the jury that still, with all the evidence before them, it was not necessary that they must find that the plaintiff had made out his case, but that the presumption was against the defendant before them until their verdict found otherwise. If the charges so given in the instant case and so sustained by the construction of the Supreme Court of Florida stand, then it is submitted that the pronouncement of this court in the case of *Western & Atlantic* v. *Henderson, supra,* is nullified and amounts to naught within the State of Florida, regardless of the fact that the Constitution of the United States follows the flag.

Therefore, it is respectfully submitted:

That the State Statute attacked is, as it reads and as construed by the Supreme Court of Florida, unconstitutional and void; and, as a consequence, this Court, by virtue of the Acts of Congress, the rules of this Court and the appeal herein allowed by the Chief Justice of the Supreme Court of Florida (Tr. 75-76), has jurisdiction hereof.

STATEMENT OF THE CASE.

Though the amount involved herein is of little consequence, yet the principle involved and the *constitutional rights* of appellant (and all others likewise situated) is of far reaching importance. Hence, this appeal.

The action was begun by the appellee in the Circuit Court of Gadsden County, Florida, to recover damages for the killing of two mules and damage to a wagon by collision with appellant's train at a public road crossing. Appellee alleged that the damage resulted from the negligent operation of the train at a high, rapid and excessive rate of speed and appellant's failure to give warning by the blowing of the whistle, or otherwise, of the approach of the train. (Tr. p. 2.) Appellant plead not guilty and contributory negligence. (Tr. pp. 2-5.) Trial was had, verdict returned for the plaintiff and judgment entered upon the verdict. (Tr. p. 6.) On the issues made by the pleadings appellee proved the injury (and value) and rested. (Tr. pp. 8-11.) Appellant

then, compelled to meet the presumption cast upon it by the quoted Statute, proved by the various members of the train crew that the whistle had been duly blown, that the bell was rung, that the operation of the train was not at an excessive rate of speed; and also that the plaintiff's servant, had he used ordinary care, could have avoided the accident.

Appellant also offered to prove that as between Jacksonville and Tallahassee, and possibly between Tallahassee and Pensacola, (paralleling appellant's line) it had bus line competition.

In rebuttal appellee attempted to show, by testimony more negative than positive, that the whistle was not sounded in time.

Thereupon, the Court charged the jury, imposing in its charge as a whole, and in each and every charge severally, the *presumption* of negligence upon appellant, letting the jury take with it to the jury room such presumption, notwithstanding the proof of the appellant tending to show that it had not been negligent in the respects complained of in the declaration.

The Court also refused certain charges requested by appellant, the refusal of which it is also contended deprived appellant of due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment. The several charges given which are complained of were duly excepted to severally and exceptions noted, and likewise exceptions duly noted to the refusal of the Court to give certain charges requested.

As the evidence will be briefly reviewed in the argument and the substance of said several charges will be set forth in the Specifications of Error and argument thereunder, further mention thereof here is omitted.

After verdict motion was duly made in the trial court for a new trial, motion overruled and exception noted. (Tr. pp. 42-47.) Bill of exceptions was allowed and duly settled. (Tr. p. 49.) Writ of error was then sued out to the Supreme Court of Florida. (Tr. p. 50.) The motion for a new trial (Tr. pp. 43-45), the assignments of error presented to the trial judge at the time of applying for settlement of the bill of exception, (Tr. pp. 46-49) and the complete assignments of error upon which the case went to the Supreme Court of Florida (Tr. pp. 51-53), and the petition to that Court for rehearing (Tr. pp. 63-66) raised consistently through each step in the consideration of the case in the Trial and State Appellate Court the several constitutional questions presented in the assignments of error presented to the Chief Justice of the Supreme Court of Florida at the time of applying by petition for this appeal. (Tr. pp. 69-75.)

The case is brought here on direct appeal allowed by order of the Chief Justice of the Supreme Court of Florida. (Tr. pp. 75-76.) Appellant adopted its assignments of error as a Statement of Points to be Relied Upon. (Tr. p. 78.)

SPECIFICATIONS OF ASSIGNED ERRORS INTENDED TO BE URGED.

Appellant urges each of the several assigned errors. They are briefly outlined as follows:

Assignment of Error No. 1.

(Tr. p. 69.)

The State Court erred in holding Section 7051 Compiled General Laws of Florida (Section 4964 Revised General Statutes of Florida, 1920), to be valid and not repugnant to Section I of Article XIV of the Constitution of the United States.

Assignment of Error No. 2.

(Tr. p. 69.)

The State Court erred in holding that the scope and effect of the Statute did not in the trial of the cause deprive appellant of due process and the equal protection of the laws.

Assignment of Error No. 3.

(Tr. pp. 69-70.)

The State Court erred in holding that the Statute was not discriminatory because no similar presumption was cast upon auto transportation companies handling passengers and goods for hire over the public roads.

Assignment of Error No. 4.

(Tr. p. 70.)

The validity of the Statute was questioned upon the ground that it was repugnant to the Fourteenth Amendment to the Constitution of the United States, and the State Court erred in sustaining its validity.

Assignment of Error No. 5.

(Tr. p. 70.)

The State Court erred in sustaining the charge to the jury based upon the Statute to the effect "that a railroad company shall be liable for any damage done to stock or property of another by the running of locomotives or cars unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

Assignment of Error No. 6.

(Tr. pp. 70-71.)

The State Court erred in sustaining the charge to the jury which instructed: "Therefore, although the standard of care and duty required by the law of persons in crossing railroad tracks is such as I have stated and should be applied in this case, yet, if you find from the evidence that the damage alleged was caused by the running of the defendant's railroad locomotive and train of cars on its tracks, there may be a recovery for the damage done, unless the defendant company shall make it appear by a preponderance of the evi-

dence that its employees exercised all ordinary and reasonable care and diligence in the premises."

Assignment of Error No. 7.

(Tr. p. 71.)

The State Court erred in sustaining the charge: "And if both the servant of the plaintiff and the employees of the railroad company were at fault in causing the damage alleged, there may be a recovery but the damage should be reduced in proportion to the contributory negligence of the plaintiff's servant."

Assignment of Error No. 8.

(Tr. p. 72.)

The State Court erred in sustaining the charge to the jury that if they believed from the evidence that the injury occurred by the operation of appellant's train and that its agents did not use reasonable and proper care in the operation thereof and did not give warning of the approach thereof, they should find for the plaintiff "unless the defendant company has made it appear by a preponderance of the evidence that its agents and employees used due care—all ordinary and reasonable care and diligence in the operation of said locomotive and train."

Assignment of Error No. 9.

(Tr. pp. 72-73.)

The State Court erred in sustaining the charge to the jury that if they found the damage was caused jointly by the alleged negligence of appellant and contributed to by the alleged negligence of plaintiff's serv-

ant, that they might still find for the appellee, but that his damage should be diminished in proportion to the contributory act of his servant.

Assignment of Error No. 10.

(Tr. p. 73.)

The State Court erred in sustaining the refusal of the trial court to give the second charge requested by appellant, which sets forth substantially the rule of law laid down by this Court in the case of Baltimore & Ohio Railroad Co. vs. Goodman.

Assignment of Error No. 11.

(Tr. p. 74.)

The State Court erred in sustaining the refusal of the trial court to give the third charge requested by appellant, which sets forth substantially the rule of law laid down by this court in the case of Baltimore & Ohio Railroad Co. vs. Goodman.

Assignment of Error No. 12.

(Tr. pp. 74-75.)

The State Court erred in sustaining the charges given by the trial court upon the theory and conclusion that they were sustained by the decision of this Court in the case of Mobile, Jackson & Kansas City R. R. Co. vs. Turnipseed.

Assignments numbered 1, 2 and 4 will be argued together.

Assignments numbered 5 to 9, inclusive, embracing the several charges to the jury construing the Statute attacked, which construction appellant contends as to each charge deprived it of its constitutional rights, will be consolidated.

ARGUMENT.

SUMMARY OF THE FACTS.

Appellee proved by his servant the collision and resulting damage. (Tr. pp. 8-13.) On cross the servant admitted he could not see far down the track, that the range of vision was not quite 200 yards, that he could see "kinda cattacornered" before he got to the track. (Tr. p. 10.) After proof as to value plaintiff rested. (Tr. p. 13.)

Appellant then proved by its engineer Lee that one team was seen to cross ahead of him and another, the one that was struck, shortly followed. The automatic air bell attached to the engine was ringing. Witness whistled at the whistle post for the crossing and then again. He was making an ordinary speed of forty to forty-five miles an hour, not operating carelessly, train properly equipped, and made application of emergency brakes. The brakes responded; train could not have been stopped more quickly. He continued to blow as he reached the crossing. (Tr. p. 15.)

Appellant's fireman Hayes testified that the engineer sounded the crossing signal some three hundred yards from the crossing; that the bell was ringing. (Tr. p. 16.) The engineer put on his brakes. It was a seven-car train; the train responded readily to the

brakes; that the engineer was something like three hundred yards from the crossing when the first blast was sounded. (Tr. p. 17.)

Appellant's brakeman Ben Johnson testified that a signal whistle was sounded for the road crossing, the bell was ringing, the brakes were applied and the train stopped in about a length. (Tr. p. 18.)

Appellant's conductor Thomas, in charge of the train, testified it was running from Jacksonville to River Junction to connect there with the L. & N. handling Pullmans for New Orleans, La. The accident occurred about 3:30 in the afternoon; the crossing signal was sounded before reaching the crossing; he heard it. Witness could not say with reference to the bell, not being positive; the whistle was being sounded when the emergency brakes were applied. The brakes responded promptly; the train could not have stopped sooner. Speed about 35 or 38 miles—regular speed. Nothing could have been done to avoid the accident. (Tr. p. 20.) No defective equipment, no negligent handling of the train.

Appellee's driver, Lasaw Richardson, admitted to the conductor that he wasn't paying much attention and did not realize the train was coming until he got right on the track and then he halted his mules and attempted to back them off the track. (Tr. p. 21.) (Note: This statement was never denied by appellee's driver—Lasaw Richardson, who had testified as to the collision and resulting injury.)

Mrs. D. K. Kelly, a nearby resident, testified for appellant, that she was not far from the crossing, saw the accident just as the train hit; that the train blew before the wagon was struck; when it blew she got up and went out on the porch and saw the train approaching. The driver of the wagon did not seem to notice the train; he seemed unconcerned when the train first blew. The bell on the engine was ringing before the train stopped. When she got up and went out on the porch the train was coming; she looked around for her boy, stood there "a few minutes" and the mule team was coming; when she turned to go back she heard the screech of the brakes and looked back and the driver had the mules reared back trying to back them. The whistle blew more than one time; it continued blowing a second time. She was not connected with appellant. (Tr. p. 24.)

P. H. Tharp saw the wagons crossing and saw the smoke of the train. He heard the blow for the crossing; one made it across and witness stated to A. W. Tharp, "Look at them fools." "He thought he could make it over too and he kind of slashed the mules with his lines, then tried to stop, and couldn't make it." (Tr. p. 25.) Witness paid no attention to the bell but heard the train blow. Appellee's driver appeared to stop and look for the train, yet he appeared to think he could make it over and the train was too close; he saw he could not and ran out the back end of the wagon. (Tr. p. 26.)

A. W. Tharp, for appellant, testified that he was at the crossing, saw the wagons when they started across,

but the train happened along and blew and appellee's driver kept coming and did not stop his mules at all, then stopped and tried to back them off but couldn't do so. Witness heard the train blow before it got to the crossing; paid no attention to the bell. The second wagon was the one that had the collision. (Tr. p. 28.)

Conductor Thomas also testified that he knew of bus competition as against appellant as between Jacksonville and Tallahassee, Florida, but did not know personally of competition as between Tallahassee and Pensacola; also, that he considered the view of the track at that point clear. (Tr. p. 22.)

Appellee, in rebuttal to appellant's testimony, produced one Joe Woodberry, who testified that he was in his field when the accident happened, less than a quarter of a mile from the crossing; that he could see and *hear* the train coming, that it did not blow at the post; that it was fifty yards from the crossing when it did blow; that it was going thirty or forty miles an hour when it blew. (Tr. p. 32.) On cross he admitted that he saw the train sound the whistle after it passed the blow post; he could not see the crossing from where he stood. He could see the last coaches of the train about the time the engine got on the crossing, then it went behind the tobacco barn and he could see no more; it blew after that; witness did not know where the team was when the whistle sounded. (Tr. p. 33.) Witness was looking at the train; it was making a little fuss running along. It made a good deal of fuss and he could hear it half a mile according to the wind. (Tr. p. 34.)

Charley Hayes, a witness for appellee, testified that the train was right there at "Mr. Joe's (Woodberry's place) when it blowed for the crossing," about a hundred yards, he guessed. The train blew "toot," "toot," "toot," and hit something; the "tooting" and the "hitting" was about the same time. The train was about a hundred yards from the crossing when it first blew. (Tr. p. 34.)

Ed Jones, a witness for appellee, testified that he saw the train going along that day; he was working for Mr. Woodberry; that it was fifty or sixty yards from where they were when it blew, and shortly after that he heard a rumbling up near the crossing. If the train blew at the blow post he paid no attention. Witness heard it blow twice, "right short." (Tr. p. 36.)

Naturally, as in every case tried, each of the several witnesses differed somewhat in their testimony on cross examination.

Here the case rested and the charges later complained of in the argument were given by the Court to the jury, and those requested in behalf of appellant refused by the Court.

POINTS OF FACT.

The Points of Fact sought to be stressed by the foregoing summary of the testimony are:

1. The case is on "all fours" with that of *Western & Atlantic* v. *Henderson, supra.*

2. The evidence in the instant case in behalf of appellant was far stronger and the evidence in behalf of appellee as weak, if not much weaker, than the evidence for the appellant and appellee respectively, as reflected by the decision of this court in *Western & Atlantic Railroad Company* v. *Henderson, supra.*

3. It is clear from the record that the case is one similar in point of fact to that of

Baltimore & Ohio R. Co. v. *Goodman*, 275 U. S. 66, 72 L. ed. 167, 48 Sup. Ct. Rep. 24,

and should have been ruled by that case, the Statute of Florida to the contrary notwithstanding.

POINTS OF LAW.

The Points of Law to be argued under the Specifications of Error are:

1. The Statute denies appellant and those likewise situated (Railroad Companies) the equal protection of the law, because it requires Railroad Companies to carry throughout the trial a burden not cast upon other litigants.

2. The Statute is void and discriminatory in that it imposes upon appellant and those likewise situated (Railroad Companies) a burden not imposed upon motor carriers for hire.

3. The Statute as construed by the Supreme Court of the State of Florida, the court of last resort in said State, imposes upon appellant and those likewise situated (Railroad Companies) a burden through-

out the trial of any cause in which it is invoked that is not cast upon other litigants.

4. The refusal of the trial court, because of the Statute in question, sustained by the State Appellate Court, to give the second charge requested by the defendant, which invoked the rule of law laid down by this Court in the Goodman case, *supra,* deprived appellant of due process of law and the equal protection of the law.

5. The refusal of the trial court, because of the Statute in question, sustained by the State Appellate Court, to give the third charge requested by the defendant, which invoked the rule of law laid down by this Court in the Goodman case, *supra,* deprived appellant of due process of law and the equal protection of the law.

With the summary of the evidence and points of fact and of law outlined above, the several Specifications of Error urged will now be argued.

FIRST POINT OF LAW.

The Statute Denies Appellant and Those Likewise Situated (Railroad Companies) the Equal Protection of the Law, Because It Requires Railroad Companies to Carry Throughout the Trial a Burden Not Cast Upon Other Litigants.

Assignment of Errors No. 1, No. 2 and No. 4.

It is respectfully submitted that the above point of law is raised under Assignment of Errors No. 1

(Tr. p. 69), No. 2 (Tr. p. 69), No. 4 (Tr. p. 70), and in fact each subsequent assignment (Tr. p. 70) down to and including the 9th Assignment (Tr. pp. 72-73).

A comparison as between the Statute of the State of Florida heretofore quoted and that of the State of Georgia, Section 2780 of Georgia Civil Code, shows them to be identical. This Court, in *Western & Atlantic R. Co.* v. *Henderson, supra,* in a case tried under circumstances which appear to be exactly similar to the trial of the case at bar, reversed the Supreme Court of Georgia, which affirmed on certiorari the Georgia Court of Appeals (167 Ga. 22, 144 S. E. 905), concluding:

> "That (the Statute) of Georgia as construed in this case creates an inference that is given effect of evidence to be weighed against opposing testimony and is to prevail unless such testimony is found by the jury to preponderate. The presumption raised by § 2780 is unreasonable and arbitrary and violates the due process clause of the Fourteenth Amendment." Citing: *Manley* v. *Ga.*, 279 U. S. 1, 49 Sup. Ct. Rep. 215, 73 L. ed. 575; *McFarlin* v. *American Sugar Co.*, 241 U. S. 79, 36 Sup. Ct. Rep. 498, 60 L. ed. 899; *Bailey* v. *Ala.*, 219 U. S. 219, 31 Sup. Ct. Rep. 145, 55 L. ed. 191. *Western & Atl. R. R. Co.* v. *Henderson,* 279 U. S. 639, 644, 73 L. ed. 884, 888, 889.

To sustain the Statute the Supreme Court of Florida in its opinion heretofore cited, in sustaining the judgment against appellant, quoting from a former case, said:

> "In determining the legality and effect of a statutory regulation, the Court should ascertain

the legislative intent; and, if the ascertained intent will permit, the enactment should be construed and effectuated so as to make it conform to, rather than violate, applicable provisions and principles of the State and Federal Constitutions, since it must be assumed that the Legislature intended the enactment to comport with the fundamental law. And a statute must be so construed, if fairly possible, as to avoid, not only the conclusion that it is unconstitutional, but also grave doubts upon that score. *Burr* v. *Florida East Coast Ry. Co.*, 77 Fla. 259, 81 So. 464."

(.... Fla. ...., 137 So. 719, 723) (Tr. p. 59).

The opinion of the State Court sets forth the contention of appellant but brushes it aside upon the apparent theory that while both statutes are worded alike, the Georgia Statute had one effect and the Florida Statute had another effect, relying upon

Seaboard Air Line Ry. Co. v. *Thompson*, 57 Fla. 155, 48 So. 750.

Yet, reference to the Thompson case shows that the Supreme Court of Florida there reversed a case under somewhat similar circumstances to the one involved here; that the constitutional question involved here was not there raised, but, conversely, reference to the record in the present case shows that the Statute was construed by the trial court in the instant case similar to the construction placed upon it by the Georgia Court in the case reversed by this court, and the instant case, notwithstanding such construction, was affirmed by the Florida Supreme Court.

Briefly, it is submitted that the Statute speaks for itself and the facts in the two compared cases speak

for themselves and permit of but one determination by this court, viz., that the Statute is unconstitutional.

The well recognized rule of this court that it will follow the State Court's construction of a state statute is not lost sight of in this argument. But it is submitted that where, as in the instant case, the Statute plainly says one thing, the Court construes it to mean another, but notwithstanding, that construction gives to the Statute, as it has done in the instant case, the same effect as the plain language of the Statute without judicial construction, that then the constitutional rights guaranteed to the appellant have been invaded and the Statute must necessarily be held invalid.

In support of its reasoning to the effect that the Statute attacked is not invalid and that the instant case is not controlled by that of *Western & Atlantic* v. *Henderson, supra,* the Supreme Court of Florida proceeds with the reasoning by reference to the case of

Mobile & K. C. R. Co. v. *Turnipseed,* 219 U. S. 35, 55 L. ed. 78, 31 Sup. Ct. Rep. 136,

referring to the law as there construed, as a statute quite similar in its operation to the Florida Statute, and that such on appeal to this Court from the Supreme Court of Mississippi was held constitutional, the Florida Court, through its Commissioner, stating:

> "That the only legal effect of the inference was to cast upon the railroad company the duty of producing some evidence to the contrary. When that was done, the inference was at an end and the question of negligence was one for the jury upon all the evidence." (Tr. p. 60—137 So. 719, 723.)

This statement being taken from the language of this Court in the Turnipseed case, *supra*, by the Florida Court, yet, what was the effect and result so far as the appellant's constitutional rights were concerned? If the only legal effect of the inference was to cast upon the appellant the duty of producing some evidence to the contrary, then certainly, under this record it could not and cannot be said that such was not done. If such was done and the Court charged the jury that the presumption of negligence still obtained (as it did) and, as against objections to such charges upon the ground that they deprived this appellant of its rights, it is submitted that the construction so placed by the Florida Supreme Court upon its Statute unquestionably, in the light of its own language, deprived the appellant of its constitutional rights.

Furthermore, if the Statute is similar to that of the Statute of Mississippi, sustained in effect by this Court in the Turnipseed case, would not the rule of law as to charging the jury under the facts shown in the instant case be that followed by the Mississippi Court rather than that followed by the Georgia Court construing the Statute condemned by this Court? In response to the decision of this Court in the Henderson case, the Supreme Court of Mississippi, in the case of

N. O. & G. N. R. Co. v. *Walden*, 160 Miss. 102, 115, 133 So. 241, 245, 246,

where a case somewhat similar to the present one had been tried, said:

> "The sixth rule in the Thornhill case comes clearly within the condemnation of the Henderson

case, and, if that rule is based on a correct interpretation of the Statute, then the Statute also comes within its condemnation. But, as hereinbefore set forth, that rule is not based on a correct interpretation of the Statute, and therefore it becomes our imperative duty to overrule the cases announcing or applying it."

And the Court then also said:

"What we here hold, and all we do now hold, is that when in an action for damages from an injury of the character described in the Statute, the facts and circumstances of the injury are given in evidence by the plaintiff at any stage of the trial, whether it conflicts with similar evidence of the defendant or not, or are given in evidence by the defendant only, and which evidence the jury is without right to reject, *no instruction should be given to the jury on the statutory presumption.*" (Italics by writer.)

In the case of

Seaboard Air Line Ry. Co. v. *Fountain*, 173 Ga. 593, 596, 600, 160 S. E. 789, 790, 792,

which was a case with facts similar to the instant case, and one tried after the decision of this Court in the Henderson case, and after the State of Georgia had adopted the Mississippi Statute, in the language of the Georgia Court, "*in totidem verbis*," the Supreme Court of Georgia, in construing that Statute, on October 15, 1931, where the trial court had charged the jury as follows:

"And in this connection I will charge you this, that in all cases against railroad companies for damages done to persons or property, proof of the

> injury inflicted by the running of the locomotives or cars of such companies shall be *prima facie* evidence of the lack of reasonable skill and care on the part of the company. But this, of course, is subject to rebuttal. If the railroad company shows to your satisfaction that they did exercise the care required by the law to be exercised, that they were not guilty of such negligence, then, of course, that presumption, if there be such, (*prima facie* I should have said instead of presumption), and I withdraw the presumption, would be rebutted;"

said:

> "Thus the Supreme Court of the United States by clear implication holds that the Mississippi Statute which we have under consideration would be unconstitutional and void if the Supreme Court of that State had held that it had any greater effect than to create a mere inference which would disappear whenever the railroad company introduced any evidence tending to disprove the existence of such negligence. In view of the construction of the Mississippi Statute by the Supreme Court of that State and the Supreme Court of the United States, we feel constrained to hold that the instruction complained of by the railroad company was erroneous and that a new trial should be granted."

Consequently, assuming now that by the decision of the Supreme Court of Florida in the instant case that the Florida Statute is similar in effect to the Mississippi Statute, notwithstanding the decision of the Supreme Court of Mississippi, *supra*, rendered March 23, 1931, and the decision of the Supreme Court of Georgia rendered October 16, 1931, the decision of the Florida Supreme Court being rendered November 7, 1931, we have

in effect one Statute for the three states with the Constitution of the United States applying in one way to a Statute in the States of Georgia and Mississippi and in a different way to the Statute of the State of Florida.

Hence, we submit that the Statute is, in and of itself as written, and by its plain language, and as construed in the instant case by the Supreme Court of Florida, unconstitutional and void, because it denies to the appellant the equal protection of the law for the several reasons set forth under the four sub-heads, (a), (b), (c) and (d), heretofore discussed with reference to the jurisdiction of this Court.

Another vice in this Statute which appellant contends is fatal is the discriminatory application to appellant, and others likewise situated, placed upon it by the State Supreme Court in the cases of *Luster* v. *Geneva Mill Co., supra, J. Ray Arnold Lbr. Co.* v. *Carter, supra,* and *Grace* v. *Geneva Lumber Company, supra,* which grounds the application of the Statute, not upon the police power invoked to protect the citizen from injury or damage to persons and property by the operation of dangerous instrumentalities, but solely upon the ground that the Statute applies to those railroads only which handle passengers or goods for hire. Stated otherwise, under the construction of the State Court, if appellant, or any other railroad company, was operating engines and cars upon a railroad track, the presumption of negligence cast by the Statute applies to it if and because it handles for hire one passenger or one carton of cigarettes or a sack of flour, regardless of how well

the equipment is maintained and operated; while on the other hand the operator perchance, over the same track or over another railroad track, of a log train hauling logs as an incident to its own business, regardless of how heavy the train is, how poorly manned or negligently equipped, no such presumption attaches in case of injury or damage to the citizen caused by the operation of this log train. And again, though in the last mentioned cases the question of common carriage for hire and of dangerous instrumentalities is made the basis for sustaining the alleged unjust discrimination, yet the same Court, in the case of *Florida Motor Lines* v. *Ward, supra,* holds that (notwithstanding the busses of the Florida Motor Lines handle passengers for hire) the Statute is not applicable to the motor vehicle carrier for hire. This point will be further discussed under the succeeding point of law.

SECOND POINT OF LAW.

The Statute Is Void and Discriminatory In That It Imposes Upon Appellant and Those Likewise Situated (Railroad Companies) a Burden Not Imposed Upon Motor Carriers for Hire.

Assignment of Error No. 3.

This point is raised under Assignment of Error No. 3 (Tr. pp. 69-70), and indirectly under each of the preceding assignments.

The contention is that appellant, a railroad company, engaged in common carriage by rail, is denied the equal protection of the law because the Statute casts upon it a presumption of negligence when any

injury or damage occurs from the operation of its engines, trains or cars, whereas, no such presumption is cast upon auto transportation companies handling passengers and property for hire.

In presenting this point we submit that early decisions bearing upon the question are of little value because they relate to a period in the history of Florida when auto transportation companies were unknown and state highways were a dream.

The legislative history of Florida shows that the State first considered the building of State highways in 1915, and that gradually the legislative program was worked up until a most comprehensive system of highways was planned and authorized and financial aid provided for the construction thereof by an excise tax levied on gasoline.

When this Statute was passed as Section 17 of Chapter 4071 Laws of Florida, Acts of 1891, we submit that the courts judicially know that there were no modern highways in Florida and that even in the country generally, and certainly not in Florida, auto transportation companies operating as carriers for hire were unknown. Also, on the other hand, that during and after the construction of the highway system in the State this business so grew and developed that certain legislative regulations were passed, and competition by motor vehicle for hire existed when the collision involved here occurred.

Chap. 6881 Laws of Florida, Acts of 1915, p. 187, (An Act relating to the licensing of motor vehicles used for hire or otherwise.)

Chap. 6883 Laws of Florida, Acts of 1915, p. 190; (An Act providing for the creation of the State Road Department.)

Chap. 7275 Laws of Florida, Acts of 1917, p. 29; (An Act amending Chap. 6881 *Ibid.*)

Chap. 7328 Laws of Florida, Acts of 1917, p. 161; (Amending Chap. 6883 *Ibid.*)

Chap. 7737 Laws of Florida, Acts of 1918, p. 48; (Amending former acts.)

Chap. 7899 Laws of Florida, Acts of 1919, p. 252; (Amending the Act relative to the State Road Department.)

Chap. 7900 Laws of Florida, Acts of 1919, p. 254; (Amending the Act relating to the State Road Department.)

Sections 1192-1202, Revised General Statutes of Florida, 1920.

Chap. 8410 Laws of Florida, Acts of 1921, p. 47; (Relating to license taxes on motor vehicles used for hire and otherwise.)

Chap. 8411 Laws of Florida, Acts of 1921, p. 60; (Imposing a license tax of 1¢ per gallon on gasoline to be used in the construction of State roads.)

Chap. 8553 Laws of Florida, Acts of 1921, p. 355; (Authorizing any county or road district to aid in the construction of State roads.)

Chap. 8575 Laws of Florida, Acts of 1921, p. 384; (Levying 1 mill to meet Federal aid in State road construction.)

Chap. 9120 Laws of Florida, Acts of 1923, p. 27; (An Act imposing license tax of 3¢ per gallon gasoline to be used in State road construction.)

Chap. 9311 Laws of Florida, Acts of 1923, p. 367; (Designating and establishing a system of State roads.)

Chap. 9312 Laws of Florida, Acts of 1923, p. 371; (An Act relating to the State Road Department, prescribing its duties and powers.)

Chap. 10025 Laws of Florida, Acts of 1925, p. 12; (Increasing the gasoline tax for State roads from 3¢ to 4¢ per gallon.)

Chap. 10182 Laws of Florida, Acts of 1925, p. 370; (Amending previous Acts relating to the licensing of motor vehicles used for hire or otherwise.)

Chap. 10186 Laws of Florida, Acts of 1925, p. 388; (Regulating the operation of motor vehicles on State highways.)

Chap. 10269 Laws of Florida, Acts of 1925, p. 493; (Amending Chap. 9311 designating certain State roads.)

See also the case of

Lewis v. *Leon County,* 91 Fla. 118; 107 So. 146, 150, 151.

And in 1929 the regulation thereof was placed by the State under the jurisdiction of the Railroad Commission. See Chap. 13700 Laws of Florida, Acts of 1929, p. 348. And further, more strict and more comprehensive legislation was enacted to cover and control the situation and to meet certain defects in the Act of 1929, pointed out by this court in the case of

Smith v. *Cahoon,* 283 U. S. 553, 75 L. ed. 1264, 51 Sup. Ct. Rep. 582.

See

Chapters 14764 Laws of Florida, Acts of 1931, p. 486, 15625 Laws of Florida, Acts of 1931, p. 1090.

The Supreme Court of Florida has very recently sustained legislation permitting common carriers on the highways to operate with a greater gross weight than permitted to private vehicles.

Tyson v. *Stoutamire*, ... Fla. ....; 140 So. 454, (Adv. Sheet #3, Apr. 21, 1932.)

The foregoing statutes and the decision of the State Court in Lewis vs. Leon County are cited solely and only for the purpose of bringing to the attention of this Court the status of the State when the Statute here attacked was passed, as compared with the situation with reference to the operation of motor vehicles, and especially motor vehicles for hire, when the collision occurred and at the present time.

"This court takes judicial notice of this legislation."

Abie State Bank v. *Bryan*, 282 U. S. 765, 778; 75 L. ed. 690, 704; 51 S. C. R. 252.
Owens v. *Hull*, 9 Pet. 607, 625; 9 L. ed. 246, 252.
Hanley v. *Donohue*, 116 U. S. 1, 6; 29 L. ed. 535, 537; 6 Sup. Ct. Rep. 242.
Lloyd v. *Matthews*, 155 U. S. 222, 227; 39 L. ed. 128, 130; 15 Sup. Ct. Rep. 70.

It is well settled by the decisions of this court that

"A police regulation, although valid when made, may become, by reason of later events, arbitrary and confiscatory in operation."

Abie State Bank v. *Bryan*, 282 U. S. 765, 772, 75 L. ed. 690, 701; 51 Sup. Ct. Rep. 252.
Smith v. *Ill. Bell Teleph. Co.*, 282 U. S. 133, 162; 75 L. ed. 255, 270; 51 Sup. Ct. Rep. 65.

Allen v. *St. L. I. M. & S. R. Co.*, 230 U. S. 553, 555, 556; 57 L. ed. 1625, 1627, 1628; 33 Sup. Ct. Rep. 1030.

Lincoln Gas & E. L. Co. v. *Lincoln*, 250 U. S. 256, 268; 63 L. ed. 968, 976; 39 Sup. Ct. Rep. 454.

This brings us to the question of what is to be considered a just basis for the regulation sought by the Statute as construed by the Supreme Court of Florida to be imposed upon appellant and others likewise situated.

In the cases of *Luster* v. *Geneva Mill Co., supra, J. Ray Arnold Lbr. Co.* v. *Carter, supra, and Grace* v. *Geneva Lumber Company, supra*, the State Court made the clear distinction that if the railroad was not being operated solely for the transportation of logs, but was hauling any freight for hire, then the Statute would apply. In short, these decisions place the application of the Statute as resting solely upon a carrier for hire. If that be a just basis, and by such construction saved the Statute from being condemned as discriminatory and contrary to the Fourteenth Amendment, then upon what reasonable basis, we pray, can it be sustained as applying to appellant when the same court holds, in a case against a motor carrier for hire—

> "Neither is this a case in which the presumptive evidence rule as prescribed in Section 4964, Revised General Statutes of 1920, (Section 7051 Compiled General Laws of 1927), or the comparative negligence rule as prescribed by Section 4965, Re-

vised General Statutes of 1920, (Section 7052, Compiled General Laws of 1927), may be invoked."
Florida Motor Lines v. *Ward, supra.*

In the case of

Seaboard Air Line Ry. Co. v. *Simon,* 56 Fla. 545, 47 So. 1001,

the Supreme Court of Florida, in considering there a statute which provided "that any person, firm or corporation operating any railroad in this State" should, within ninety days after the filing of a claim for the loss of or damage to any shipment, pay the claim, and upon failure so to pay "then they shall pay the said claimant the sum of 25% per annum on the principal sum of said claim, and when the said claimant shall bring suit and recover for his claim • • • he shall be allowed in said suit the said 25% per annum in addition to the principal sum of said claim and have judgment therefor;" provided, the recovery was greater than the sum tendered.

There the railway company attacked the Statute upon the ground that it was discriminatory because the Statute was limited in its operation to only one class of common carriers of goods, to-wit, railroads. The Supreme Court of Florida in passing upon the Statute said:

> "An unreasonable classification of persons or corporations for the purpose of legislative regulation that would be burdensome to those included in the class regulated, leaving others who are similarly conditioned with reference to the subject

regulated free from the regulation and burden, may be an arbitrary exercise of governmental powers."
(56 Fla. 549, 47 So. 1002.)

It also held that the subject regulated was not peculiar to railroads, but was equally and similarly applicable to all common carriers of goods, whether the service was rendered by the use of railroads, boats or other means. After making this finding and holding the State Court disposed of the Statute there questioned in this language—

> "The classification adopted should have some just relation to, or reasonable basis in, essential differences of conditions and circumstances with reference to the subject regulated, and should not be merely arbitrary; and all similarly situated or having similar legal duties and obligations in regard to the subject regulated, should be included in one class, at least where there are no practical differences that are sufficient to legally warrant a further or special classification in the interest of the general welfare."
>
> 56 Fla. 552, 47 So. 1003, citing; McGehee Due Process of Law, 56 *et seq.*; *Jones* v. *Brim*, 165 U. S. 180, 41 L. ed. 677; 17 Sup. Ct. Rep. 282;
>
> *In re Van Horne* (N. J. Ch.), 70 Atl. 986;
>
> *Ind. Tr. & Term. Co.* v. *Kinney* (Ind.), 85 N. E. 954.

So it would seem if carriage for hire is to be made a reasonable basis for a just classification then the Statute is unjustly discriminatory because it places a burden upon appellant and other railroad companies that it does not place upon persons, firms and corporations handling for hire, as either common, contract or

private carrier, goods over the highways of the State. But, it may be argued that the test to be applied is that the railroad company is engaged in the operation of dangerous instrumentalities and that the use of such by them is a just basis for the classification. This question begs two answers. First, if such be the test then can it be said that the instrumentalities used on a log road are any less dangerous than those used on the common carrier railroad, especially in view of the fact, which the courts know, that every possible safeguard has been thrown around the operation of these instrumentalities by Congress where such are used in the handling of interstate commerce; and the courts also know that in this day and time the operation of a railroad in intrastate commerce only is an impossibility. Second, conceding that dangerous instrumentalities is a proper test for the classification attempted by the Statute, then still it is unjustly discriminatory in that it does not apply to the motor vehicle carrier for hire because those very vehicles have been held by the very same Court to be dangerous instrumentalities.

City of Tallahassee v. *Kaufman*, 87 Fla. 119; 100 South 150.

Maxwell v. *City of Miami*, 87 Fla. 107, 100 So. 147.

Florida Motor Transportation Company v. *Hillman*, 87 Fla. 512; 101 So. 31.

Shaw v. *State*, 88 Fla. 320, 102 So. 550.

Herr v. *Butler*, 101 Fla. 1125, 132 So. 815.

Greene v. *Miller*, 102 Fla. ...., 136 So. 532.

In *Herr* v. *Butler, supra,* quoted with approval in *Greene* v. *Miller, supra,* the Supreme Court of Florida (101 Fla. 1125-1127, 132 So. 815, 816) said:

> "It appears that this case comes well within the rule as stated in the case of *Southern Cotton Oil Co.* v. *Anderson,* 80 Fla. 441, 86 So. 629, 16 A. L. R. 255, in which the Court say:
>
> 'A motor vehicle operated on the public highways is a dangerous instrumentality, and the owner who intrusts it to another to operate is liable for injury caused to others by the negligence of the person to whom it is intrusted * * *.
>
> 'An automobile operated upon the public highways being a dangerous machine, its owner is responsible for the manner in which it is used, and his liability extends to its use by any one with his knowledge or consent.
>
> 'The Legislature, under its police power to protect the public from dangerous instrumentalities using the highways, has imposed rigid restraints, regulations and restrictions upon the use of motor vehicles, thus recognizing the danger from their operation, which makes owners liable in damages under the doctrine of *respondeat superior* as applied to dangerous agencies.
>
> 'Chapter 7275, Acts 1917, treats the automobile when operated on the public highways as a dangerous instrumentality, so as to require special regulation and control under the police power, and it is not divested of its dangerous character in an action for damages caused by the negligence of the operator, who is using the car with the owner's knowledge or consent.' "

Therefore, it is submitted that the evolution of the transportation problem has now placed motor vehicle carriers, with respect to the Statute herein complained of, on the same plane and in the same

class with other common carriers, and that unquestionably the Statute is now unjustly discriminatory and void.

> "The 14th Amendment, 'in declaring that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoilation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; *that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs,* and the enforcement of contracts; that *no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition,* and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses." (Italics that of the writer.)
>
> *Barbier* v. *Connolly,* 113 U. S. 27, 31; 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357, 359.
>
> *Yick Wo* v. *Hopkins,* 118 U. S. 356, 369; 30 L. ed. 220, 226; 6 Sup. Ct. Rep. 1064, 1070.
>
> *Connoly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, 559; 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431.

THIRD POINT OF LAW.

The Statute As Construed by the Supreme Court of the State of Florida, the Court of Last Resort in Said State, Imposes Upon Appellant and Those Likewise Situated (Railroad Companies) a Burden Throughout the Trial of Any Cause in Which It Is Invoked That Is Not Cast Upon Other Litigants.

Assignment of Errors Nos. 5, 6, 7, 8, 9 and 12.

This point, as the writer sees it, involves severally the Assignment of Errors numbered 5 to 9, inclusive (Tr. pp. 70-73), and also the last or 12th numbered error assigned. (Tr. pp. 74-75.) These several errors assigned reach severally and collectively to the construction placed upon the Statute by the trial and State Appellate Court as applied to the facts in the case at bar, and to the consequent effect of such construction upon appellant because of the decision of the State Supreme Court sustaining the several charges given and the charge of the Court as a whole.

Fifth Assignment of Error.

(Tr. p. 70.)

This is based upon the Court's charge to the jury at the conclusion of the case in the language of the Statute, "That a railroad company shall be liable for any damage done to stock or property of another by the running of locomotives or cars *unless the company shall make it appear* that their agents have exercised *all* ordinary and reasonable care and diligence, the

presumption in *all cases* being against the company." (Italics by writer.)

This charge in full appears in the record. (Tr. p. 38.) It was excepted to and made a ground of motion for a new trial (Tr. p. 43); assigned as error upon settlement of bill of exceptions (Tr. p. 46); assigned as error before the Supreme Court of Florida. (Tr. p. 51.)

It is submitted clearly that this charge bore down the scales of justice as against the appellant and in favor of the appellee and thereby deprived appellant of its constitutional rights before the jury; because, under the doctrine laid down by this Court in the Henderson case, with the evidence adduced, it had then become simply a question for the jury to determine whether or not the appellee had made out his case to their satisfaction by a preponderance of the evidence without having the jury to understand, as it was given to understand by this charge, that notwithstanding the evidence adduced by appellant tending to show it was not negligent, the burden still rested upon appellant in the jury room to overcome the presumption they were given to understand existed. The Court might just as well, by this and other charges complained of here, have, in other words, said to the jury: "The injury has been proven and you should go to your room and find a verdict for Mr. Watson, unless the railroad had convinced you that it was guilty of no negligence. While Mr. Watson has made the charge, the railroad must disprove it to your satisfaction."

But the Supreme Court of the State has said by its opinion that there was no error in the giving of this charge because, in effect, the Statute, (being in the exact language of the Georgia Statute) is to be and has been construed according to the Statute of Mississippi; and yet, with the utmost respect, as we have heretofore shown, both the Mississippi Court and the Georgia Court have condemned charges of this nature. Hence, the judgment of the Supreme Court from which this appeal is taken, in sustaining the charge, adopts in language the Mississippi law, but through its judicial power enforces the Georgia Statute condemned by this Court. Therefore, it is respectfully submitted, under the authorities previously cited and the argument heretofore made, that appellant was clearly deprived of its constitutional rights as contended for throughout this proceeding. The record demonstrates, if anything, an overzealous and possibly a redundant effort to insist throughout the proceeding upon the appellant's constitutional rights. It cannot be said that this is a case where the Federal question was not raised below.

While it is well settled that the construction by a state court of a constitutional or statutory provision of the State will be controlling upon and followed by this Court, yet that rule must, and has always been held by this Court to, yield to another, and of even greater importance, which is, that where such construction deprives the litigant of the equal protection clause of the Constitution this Court will then go into the facts of the case, apply the Statute or the State Constitutional provision and reach its own conclusion as to whether or not

the litigant appealing to it has been denied the rights guaranteed by the Fourteenth Amendment. If such were not the holding of this Court the Fourteenth Amendment could be, and in some cases doubtless would be, shorn of all force and effect.

In

Truax v. *Corrigan*, 257 U. S. 312, 325, 66 L. ed. 254, 259, 42 Sup. Ct. Rep. 124,

this Court said:

> "Nor does the *Court's declaration* that the statute is a *rule of evidence bind us in such an investigation. Bailey* v. *Alabama*, 219 U. S. 219, 238, 239, 55 L. ed. 191, 200, 31 Sup. Ct. Rep. 145; *Chicago M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Mugler* v. *Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; *Corn Products Ref. Co.* v. *Eddy*, 249 U. S. 427, 432, 63 L. ed. 689, 693, 39 Sup. Ct. Rep. 325. In cases brought to this Court from State Courts for review, on the ground that a Federal right set up in the State Court has been wrongly denied, and in which the State Court has put its decision on a finding that the asserted Federal right has no basis in point of fact, or has been waived or lost, this Court, as an incident of its power to determine whether a Federal right has been wrongly denied, *may go behind the finding to see whether it is without substantial support.* If the rule were otherwise, it almost always would be within the power of a State Court practically to prevent a review here. *Kansas City Southern R. Co.* v. *H. Albers Commission Co.*, 223 U. S. 573, 591, 593, 56 L. ed. 556, 565, 566, 32 Sup. Ct. Rep. 316; *Cedar Rapids Gas Light Co.* v. *Cedar Rapids*, 223 U. S. 655, 668, 669, 56 L. ed. 594, 604, 32 Sup. Ct. Rep. 389; *Southern P. Co.* v. *Schuyler*, 227 U. S.

601, 611, 57 L. ed. 662, 669, 43 L. R. A. (N. S.) 901, 33 Sup. Ct. Rep. 277. *Another class of cases in which this Court will review the finding of the Court* as to the *facts* is when the *conclusion* of *law* and *findings* of *fact* are so *intermingled* as to *make it necessary,* in order to pass upon the question, *to analyze the facts. Northern P. R. Co.* v. *North Dakota,* 236 U. S. 585, 593, 59 L. ed. 735, 740 L. R. A. 1917F, 1148, P. U. R. 1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1; *Jones Nat. Bank* v. *Yates,* 240 U. S. 541, 552, 553, 60 L. ed. 788, 797, 798, 36 Sup. Ct. Rep. 429. In view of these decisions and the ground upon which they proceed, it is clear that in a case like the present, where the issue is whether a state statute, in its application to facts which are set out in detail in the pleadings and are admitted by demurrer, violates the Federal Constitution, this Court must analyze the facts as averred, and draw its own inferences as to their ultimate effect, and is not bound by the conclusion of the State Supreme Court in this regard. The only respect in such a case in which this Court is bound by the judgment of the State Supreme Court is in the construction which that Court puts upon the statute." (Italics by writer.)

Sixth Assignment of Error.

(Tr. pp. 70-71.)

This is based upon the charge of the Court reading in part: "Therefore, although the standard of care and duty required by law of persons in crossing railroad tracks is such as I have stated and should be applied in this case, yet, if you find from the evidence that the damage alleged was caused by the running of defendant's railroad locomotive and train of cars on its tracks, there may be a recovery for the damage done, unless the defendant company shall make it appear by a

preponderance of the evidence that its employees exercised all ordinary and reasonable care and diligence in the premises."

The charge in full appears in the record. (Tr. pp. 38-39.) It was excepted to and made a ground of motion for new trial (Tr. p. 43); assigned as error upon settlement of bill of exceptions (Tr. 47); assigned as error before the Supreme Court of Florida. (Tr. pp. 51-52.)

What has been said under the previous assignments applies likewise here and it is prayed that it be so treated and considered.

Seventh Assignment of Error.

(Tr. pp. 71-72.)

This is based upon the Court's charge to the jury: "And if both the servant of the plaintiff and the employee of the railroad were at fault in causing the damage alleged there may be a recovery, but the damage should be reduced in proportion to the contributory negligence of the plaintiff's servant."

This charge in full appears in the record. (Tr. p. 39.) It was excepted to and made a ground of the motion for new trial (Tr. p. 44); assigned as error upon settlement of bill of exceptions (Tr. p. 47); assigned as error before the Supreme Court of Florida. (Tr. p. 52.)

Briefly stated, the contention is that following immediately the two preceding charges of the Court, the vice with which it is claimed they were infected

attaches to this charge and consequently bore unjustly upon appellant's constitutional rights.

What has been said under the previous assignments applies likewise here and it is prayed that it be so treated and considered.

Eighth Assignment of Error.

(Tr. p. 72.)

This assignment is based upon the charge of the trial court sustained by the State Appellate Court to the effect that if the jury believed from the evidence that the injury occurred by the operation of appellant's train and that its agents did not use reasonable and proper care in the operation thereof, and did not give warning of the approach thereof, they should find for the plaintiff, "unless the defendant company has made it appear by a preponderance of the evidence that its agents and employees used due care—all ordinary and reasonable care and diligence in the operation of said locomotive and train."

The charge appears in full in the record. (Tr. p. 39.) It was excepted to and made a ground of the motion for new trial (Tr. p. 44); assigned as error upon settlement of the bill of exceptions (Tr. pp. 47-48); assigned as error before the Supreme Court of Florida. (Tr. p. 52.)

What has been said under previous assignments applies likewise here and it is prayed that it be so treated and considered.

Ninth Assignment of Error.

(Tr. pp. 72-73.)

This is based upon the court's charge to the jury to the effect that if they found the damage was caused jointly by the alleged negligence of the appellant and contributed to by the alleged negligence of plaintiff's servant, that they might still find for the appellee, but that his damage should be diminished in proportion to the contributory act of his servant.

The charge appears in full in the record. (Tr. pp. 39-40.) It was excepted to and made a ground of the motion for new trial (Tr. pp. 44-45); assigned as error upon settlement of bill of exceptions (Tr. p. 48); assigned as error before the Supreme Court of Florida. (Tr. p. 53.)

It is contended that following the other charges throwing the presumption upon the appellant, notwithstanding the evidence adduced, that in connection therewith it was infected with the same vice and the appellant deprived of the equal protection of the law accordingly.

What has been said under the previous assignments applies likewise here and it is prayed that it be so treated and considered.

Twelfth Assignment of Error.

(Tr. pp. 74-75.)

This assignment relates to the construction of the Statute involved by the charges of the trial court given as a whole and the decision of the Supreme Court of the State of Florida sustaining the judgment of the lower

court against appellant rendered upon the verdict following such charges, and to the judgment of the Supreme Court in its construction of the Statute sustaining, as against the several errors assigned there, based upon the charges of the trial court.

Appellant's contention, briefly stated in the outset here, being that while the Statute reads similar to the Georgia Statute condemned by this court, the State Supreme Court by its decision said that it meant what a Mississippi Statute said that had been sustained by this court, yet the effect of such holding that there was no error in the charges given at the trial of the case places the operation of the Statute in a class with, and gives to it the same force and effect as, the Georgia Statute previously condemned by this Court.

The Supreme Court of the State, sustaining the charges given by the trial court under the Statute involved, cites as authority for its holding

> *Seaboard Air Line Ry.* v. *Thompson,* 57 Fla. 155, 157, 48 So. 750,

and other cases. Yet, with all due respect, we submit that while that decision, if it had been applied to the facts in this case as appellant contends it should have been, might have saved the Statute from condemnation as in conflict with the appellant's constitutional rights under the rule pronounced by this Court in the Henderson case; yet, the very language in the Thompson case which might have saved the Statute from the criticism made here was obviously omitted, or rather disregarded, by the trial court, and apparently by the

State Supreme Court, because, in the Thompson case Mr. Justice Taylor, then speaking for the Court and quoting from the Crosby case referring to the presumption sought to be cast by the Statute, said:

> "This presumption ceases when the railroad company has made it appear that its agents have exercised all ordinary and reasonable care and diligence. In the presence of such proof by the railroad company the jury do not take any such presumption with them to the jury room in weighing the evidence and in coming to a determination. The Statute does not create such a presumption as will outweigh proof or that will require any greater or stronger or more convincing proof than any other question at issue. *All that the Statute does is to cast upon the railroad company the burden of affirmatively showing that its agents exercised all ordinary and reasonable care and diligence, and here the statutory presumption ends.*" (Italics by writer.)

By reference to the record (Tr. p. 40), it will be found first, that the Court refused to give the charge as requested by the appellant, and, second, gave the charge as modified in the following language:

> "The presumption of negligence cast upon railroads by our Statute in personal injury cases ceases when the railroad company has made it appear by a preponderance of the evidence that its agents have exercised all ordinary and reasonable care and diligence. In the presence of such proof by the railroad company the jury do not take any such presumption with them to the jury room in weighing the evidence and in coming to a determination. The Statute does not create such a presumption as will outweigh proof or that will require

> any greater, or stronger or more convincing proof to remove it."

That part of the construction of the Statute given in the Thompson case as taken from the Crosby case which is italicized was deleted by the Court. The Court had previously all through charged the jury that the burden was upon this appellant to, in effect, purge itself of negligence. (Tr. pp. 38-40.) Consequently, the jury, composed of laymen, could not by any ordinary process of reasoning have weighed and determined the questions of construction as involved in the charge as a whole, and the result upon appellant was, it is contended, in effect, practically the same as if the Court had simply charged them that the burden was upon the appellant to prove by a preponderance of the evidence that the resulting injury and damage sustained was *not* due to its negligence.

It certainly cannot be said on this record, from the evidence and the charges given consequent thereupon, that the jury went to their room to consider the case understanding, from a clear, concise charge of the Court with regard to the statute in question, that

> "All that the Statute does is to cast upon the railroad company the burden of affirmatively showing that its agents exercised all ordinary and reasonable care and diligence, and here the statutory presumption ends."

Clearly, had the trial court taken that which appellant contends was the correct view of the case, the jury would not have been charged on the question of

the presumption of negligence, and had the State Supreme Court taken that view one or more of the assignments of error based upon exceptions to the charges given and to the denial of the motion for a new trial would have been sustained and the case reversed.

So, it is respectfully submitted here, that to have saved the Statute from condemnation in the instant case the trial court under the evidence should have done one of two things: (a) Let the case go to the jury as any case would ordinarily go, with the burden resting upon him who alleged negligence; or, (b), at least the jury should have been charged that under the *evidence submitted* they did *not* take any *statutory presumption* against appellant with them to the jury room, and this only as to the Statute.

It may be urged that the record does not show that appellant asked for proper instructions on this point.

> "But the defendant's failure to ask proper instructions does not cure the error in the instructions which were given and excepted to."
>
> *St. Paul Fire & Marine Ins. Co.* v. *Bachman*, ... U. S. ...., 76 L. ed. (Advance Sheet No. 8), 355, 358. Decided Feby. 23, 1932.

Consequently, we submit it is clear under the decisions of this Court that the appellant was deprived of rights guaranteed to it by the Fourteenth Amendment by the judgment of the Supreme Court of Florida in sustaining against the assignment of errors urged there the charges given by the trial court and duly excepted to by appellant.

FOURTH AND FIFTH POINTS OF LAW.

Fourth.

The Refusal of the Trial Court, Because of the Statute In Question, Sustained by the State Appellate Court, to Give the Second Charge Requested by the Defendant, Which Invoked the Rule of Law Laid Down by This Court In the Goodman Case, Supra, Deprived Appellant of Due Process of Law and the Equal Protection of the Law.

And

Fifth.

The Refusal of the Trial Court, Sustained by the State Appellate Court, to Give the Third Charge Requested by the Defendant, Which Invoked the Same Rule of Law.

Assignment of Errors Nos. 10 and 11.

The Fourth Point of Law above questions the refusal of the trial court, sustained by the State Appellate Court, to give the second charge requested by the defendant. It is made the basis of Assignment of Error No. 10. (Tr. p. 73.)

The charge was requested and denied at the conclusion of the trial (Tr. pp. 40-41), and made the basis of the 10th ground of the motion for a new trial (Tr. p. 45); made the basis of the 10th Assignment of Error upon settlement of the bill of exceptions (Tr. p. 48); and made the basis of the 10th Assignment of Error before the Supreme Court of Florida. (Tr. p. 53.)

The Fifth Point of Law reaches to the same question, except that the conclusion of the third charge

requested was worded somewhat differently. It is made the basis of Assignment of Error No. 11. (Tr. p. 74.) The third charge requested by the defendant was also denied by the trial court. (Tr. p. 41.) It was made the basis of the 11th ground of the motion for a new trial. (Tr. p. 45); made the basis of the 11th Assignment of Error upon settlement of the bill of exceptions (Tr. p. 48); and the basis of the 11th Assignment of Error before the Supreme Court of Florida. (Tr. p. 53.)

These two points of law will be argued together, as each reaches to the same constitutional right of appellant, the only substantial difference in the language of the two charges refused being the conclusion.

Assignment of Error No. 10.

(Tr. pp. 73-74.)

The second charge requested by the defendant in the trial of the cause reads as follows:

> "I charge you as a matter of law that the standard of care required of a person in crossing a railroad track to be applied in actions to recover damages for injuries sustained by collision with a train at a railroad crossing is that when a person drives upon a railroad track, he knows that he goes to a place where he will be killed or sustain damage if a train comes upon him before clearing the track. He knows he must stop for the train, not the train stop for him. On such circumstances, if a driver of a vehicle cannot be sure otherwise whether a train is dangerously near, he must stop and get out of his vehicle (although, obviously, he will not often be required to do more than to stop and to look), and if you find from the evidence that the driver of plaintiff's vehicle could by the applica-

tion of such standard of care have avoided the injury, but that he failed to stop and look for the approach of the train, then I charge you that the plaintiff, because of such negligence of the driver of the vehicle and team, is barred of recovery and your verdict should be for the defendant."

It is submitted that with the exception of the conclusion quoted above the language clearly charges the law of the case as laid down by this Court in the case of

Baltimore & Ohio R. Co. v. *Goodman*, 275 U. S. 66, 72 L. ed. 167, 48 Sup. Ct. Rep. 24.

The charge substantially, if not almost identically, follows the language of Mr. Justice Holmes in the Goodman case. Such being the rule of law as laid down by this Court with regard to crossing accidents of this kind, it is respectfully submitted that the charge should not have been refused, and the effect of the doctrine destroyed by the trial court stating partially the substance of this Court's ruling and then in effect telling the jury that it did not apply in Florida because of the Statute attacked in this proceeding.

Therefore, it is respectfully contended that the refusal of the charge as requested, under the law of the land as laid down by this Court in the Goodman case and the Henderson case, *supra*, deprived appellant of due process of law and the equal protection of the law.

As to this charge it may be urged that it does not involve a question of which this Court has jurisdiction to review. The answer is submitted that it gave in the language of this Court the law of the land upon the

subject of the respective rights and duties of the traveler on the highway at railroad crossings. Such rights and duties were inherently interwoven with, and also subject to, the application of the Statute attacked to the facts involved in the case before the Court. It is quite clear that both State Courts so treated it. The facts, except as to the gravity of the result, were practically identical with those in the Goodman case. The charge of the trial court under the Statute attacked was the same as that of the Georgia Court in the Henderson case.

Therefore, it is submitted that this assignment as before this Court brings into play its settled doctrine:

> "But where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain."
>
> *Abie State Bank* v. *Bryan*, 282 U. S. 765, 773; 75 L. ed. 690, 51 Sup. Ct. Rep. 252.
>
> *Enterprise Irrig. Dist.* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 61 L. ed. 644, 37 Sup. Ct. Rep. 318.

Assignment of Error No. 11.

(Tr. p. 74.)

What has been said under the preceding assignment applies here as well. If the conclusion of the second charge requested, the refusal of which was made the basis of the 10th Assignment, was erroneous, and justified such refusal as a matter of practice under the State law, such could not have been, and was no

ground for, the refusal of the third charge requested and made the basis of this assignment. The third charge requested was similar to the second requested, with the exception of the conclusion which reads:

> "I charge you that if you find from the evidence in this case that the employees of the defendant used all ordinary and reasonable care under the circumstances in the operation of the defendant's train, then the plaintiff is chargeable with the negligence of his servant, the driver, and the plaintiff would be barred from recovery, and your verdict should be for the defendant."

Conclusion.

In conclusion, it is respectfully submitted that each of the several numbered errors assigned are well taken, have been sustained, and that the cause should be reversed.

Further, it is submitted that should the Court be of the opinion that the appellant is not entitled to an appeal under the facts and circumstances shown in this cause, that then the said appeal can be, and appellant prays that it may be, treated as a petition for a writ of certiorari and this cause disposed of accordingly under the Statute and Rules of this Court.

Sec. 237 (c) Judicial Code as amended by Act of February 13, 1925, Ch. 229, 43 Stat. 937, Title 28, Sec. 344 (c) USCA p. 206.

Respectfully submitted,

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